

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3400-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**CHESTER F. WAGNER,
ARTHUR F. WAGNER, and
WAGNER & HOPKINS, INC.,**

Plaintiffs-Appellants,

v.

**DONALD E. ENGUM, and
BANKERS MULTIPLE LINE
INSURANCE COMPANY,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Wagner & Hopkins, Inc., Chester and Arthur Wagner appeal a summary judgment dismissing their action against Donald

Engum and his insurer.¹ The trial court dismissed some of the causes of action on the ground that the claims had been previously litigated and dismissed the remaining cause of action because no genuine issues of material fact remained and Engum was entitled to judgment as a matter of law. Because we conclude that Wagner & Hopkins' claims against Engum are precluded by the previous litigation, Chester and Arthur Wagner have no personal claims against Engum for negligence, misrepresentation or unjust enrichment, and their cause of action for intentional infliction of emotional harm is not supported by any reasonable view of the evidence, we affirm the judgment.

In the previous litigation, Engum's employer, Realty World, sued Wagner & Hopkins, Inc., to recover the commission due on an aborted real estate transaction. Wagner & Hopkins counterclaims, alleging negligence by Realty World through its employee, Engum. The court found that Realty World earned a commission but that its negligence damaged Wagner & Hopkins by the amount of the commission. The court therefore set off the damage awards and dismissed the claim and counterclaim.²

During the previous litigation, Wagner & Hopkins also moved to commence a third-party action against Engum, which the court denied. Wagner & Hopkins, along with Chester and Arthur Wagner individually, then brought this action against Engum and his insurer, alleging that he negligently performed his duties regarding the real estate sale, engaged in misrepresentation, was unjustly enriched and intentionally inflicted emotional harm on the Wagners. The trial court granted Engum's motion for summary judgment, resulting in this appeal.

The trial court properly dismissed the causes of action alleging negligence and misrepresentation because the damages awarded Wagner & Hopkins in the previous litigation preclude any further claims. Wagner & Hopkins prevailed in its counterclaim alleging negligence by Realty World through its employee, Engum. Therefore, all damages sustained by Wagner & Hopkins have been compensated in the previous action. That judgment bars any further award of damages between the same parties or their privies as to all

¹ This is an expedited appeal under RULE 809.17, STATS.

² That judgment was also appealed by Wagner & Hopkins (No. 93-2399).

matters that were or might have been litigated. See *NSP v. Bugher*, 189 Wis.2d 541, 550-51, 525 N.W.2d 723, 727-28 (1995).

Chester and Arthur Wagner suffered no personal loss by virtue of Engum's negligence or misrepresentation. Individually, they have no cause of action for torts committed against the corporation because the cause of action accrues to the corporation and may not be maintained by its shareholders in a direct action. See *Rose v. Schantz*, 56 Wis.2d 222, 229, 201 N.W.2d 593, 597 (1972).

The trial court also properly dismissed the cause of action for unjust enrichment because Engum received no money or benefit. A claim of unjust enrichment requires proof that Wagner & Hopkins conferred a benefit on Engum. *Puttkamer v. Minth*, 83 Wis.2d 686, 689, 266 N.W.2d 361, 363 (1978). By virtue of the setoff in the previous litigation, Engum received no commission as a result of the real estate transaction. The mere opportunity to receive a commission cannot be viewed as a benefit. Therefore, there is no basis for an action for unjust enrichment.

The trial court properly dismissed the cause of action by Chester and Arthur Wagner for intentional infliction of emotional harm because there is no factual basis for this cause of action. A claim for intentional infliction of emotional distress requires a showing that the conduct in question was intended to cause emotional distress. *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 695, 271 N.W.2d 368, 378 (1978). Ordinarily, subjective intent of an individual is a question of fact that cannot be determined on summary judgment. See *Gouger v. Hardtke*, 167 Wis.2d 504, 516-17, 482 N.W.2d 84, 90 (1992). Summary judgment is appropriate, however, if all reasonable inferences derived from the supporting papers defeat the claim. *Id.* Here, Engum has explicitly denied any intent to cause the Wagners any harm, including emotional distress. In response, the Wagners presented evidence establishing that they were emotionally distressed. This evidence, construed most favorably to the Wagners, does not allow an inference that Engum's conduct was intended to cause them emotional distress.

Finally, there is no basis for maintaining a claim for punitive damages. In the absence of an award of actual damages, punitive damages are

not available. See *Tucker v. Marcus*, 142 Wis.2d 425, 438-39, 418 N.W.2d 818, 823 (1988).

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.